PUBLIC VERSION

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January 19, 2017

VIA ECFS AND FEDERAL EXPRESS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: ***AT&T Corp. v. Great Lakes Commc'n Corp.*****, Docket No. 16-170, File No. EB-16-MD-001**

Dear Ms. Dortch:

On behalf of Great Lakes Communication Corp. ("Great Lakes"), I have enclosed for filing the **Public Version** of its Post-Discovery Reply Brief. As contemplated by the Commission's rules and the Protective Order entered in connection with the File noted above, all highly confidential information has been redacted from this **Public Version**.

Great Lakes is separately filing via overnight delivery hard copies of the **Highly Confidential Version** of its Brief. In addition, copies of both versions of the submission are being served electronically on AT&T's counsel, and courtesy copies are also being provided electronically to the Commission's Enforcement Bureau.

Please don't hesitate to contact me if you have any questions regarding this filing.

Respectfully submitted,

Joseph P. Bowser
COUNSEL FOR GREAT LAKES COMMUNICATION CORP.

Enclosure

cc: James F. Bendernagel, Jr., Counsel for Complainant
Michael J. Hunseder, Counsel for Complainant
Brian A. McAleenan, Counsel for Complainant
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Lisa Griffin, FCC
Anthony DeLaurentis, FCC
Sandra Gray-Fields, FCC
Christopher Killion, FCC

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AT&T CORP.

Complainant,

v. **File No. EB-16-MD-001**

GREAT LAKES COMMUNICATION CORP.

Defendant.

GREAT LAKES COMMUNICATION CORP.'S POST-DISCOVERY REPLY BRIEF

In accordance with the Staff-approved Supplemental Joint Statement on Discovery and Scheduling submitted by the parties on December 12, 2016, Defendant Great Lakes Communication Corp. ("Great Lakes" or "GLCC") respectfully submits this brief in reply to the Supplemental Brief of AT&T Corp. filed on January 10, 2017 ("AT&T Br.").

AT&T's case is riddled with conjecture and fantasy. If only the facts and law were different, AT&T has hypothesized "savings" it could have achieved *from Iowa Network Services'* tariffed charges via a new "[in]direct connection" to Great Lakes, which it just revealed in this proceeding involved CenturyLink providing an alternate transport service to AT&T over a connection between CenturyLink's switch in Sioux City and Great Lakes' switch in Spencer that has never existed. AT&T's position brings to mind the story of the economist, physicist, and chemist stranded on a desert island with no tools and a can of food. The physicist and chemist each devised an ingenious mechanism for opening the can; the economist merely said, "assume we have a can opener!" AT&T's case requires the Commission to assume the can opener of a new set of facts and a retroactive change in the law, neither of which it can, or should, do.

But buried in footnote 22 of its Brief, AT&T concedes, as it must, that it is lawful for a "CLEC and an IXC to negotiate a contract with an above-benchmark rate." AT&T Br. at 9 n.22 (citing *In re Access Charge Reform*, 16 FCC Rcd. 9923, 9948 ¶ 43 (2001) ("*Seventh Report & Order*")). AT&T's entire brief, therefore, is irrelevant as a matter of law. The terms of Great Lakes' agreements with other carriers have absolutely no relevance to AT&T's request for a wholesale revision of Section 251(a) of the Communications Act, Section 61.26 of the Commission's rules, and the policy that underlies those rules that the Commission has consistently maintained since releasing its *Seventh Report & Order* fifteen years ago.

The Commission was clear on two points in the *Seventh Report & Order*, which AT&T's brief does everything in its power to obscure: the Commission's CLEC access charge rules "provide a **bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable** and, at the same time, will enable both sellers and purchasers of CLEC access services to avail themselves of the convenience of a tariffed service offering. In addition, **this approach maintains the ability of CLECs to negotiate access service arrangements with IXCs at any mutually agreed upon rate**." *Seventh Report & Order*, 16 FCC Rcd. at 9925, ¶ 4 (emphasis added). Indeed, when the Commission announced its CLEC access charge rules fifteen years ago, it explained that those rules "continue[] our move to market-based solutions by **encouraging CLECs to negotiate rates outside of the tariff safe harbor where they see fit**." *Id*. at ¶ 5 (emphasis added). Great Lakes' IXC customers who have voluntarily contracted with Great Lakes to terminate traffic via direct, modern Internet Protocol ("IP") connections have no relevance to AT&T's ongoing self-help taking of Great Lakes' tariffed TDM services over the last five years.

But in AT&T's alternate universe, it asks the FCC to rewrite the Commission's fifteen-year-old CLEC access charge rules to allow AT&T a pass for essentially stealing Great Lakes' deemed lawful, tariffed access service for five years. It tries to justify that self-help by complaining that Great Lakes violated a non-existent requirement to provide direct trunking that does not exist and that AT&T never lifted a finger to build, "except via negotiations," in which, in AT&T's opinion, Great Lakes has "demanded a premium price or other unreasonable conditions," such as actually paying Great Lakes what it is owed for services rendered for the past five years. AT&T Br. at 1. This is not the universe the FCC created.

Even assuming AT&T could wish away the considerable expenses Great Lakes has incurred in building out its modern IP-based network that benefits its end users and connecting carriers alike, Great Lakes' operating margins have no bearing on the tariffed rate it may charge IXCs for its tariffed access services under 47 C.F.R. § 61.26. *See*, *e.g.*, *AT&T Corp. v. Bus. Telecom., Inc.*, Mem. Op. & Order, 16 FCC Rcd. 12312, 12321-23, ¶¶ 17-22 (2001) (noting that examination of a CLEC's costs as the touchstone of rate-setting would be contradictory to the FCC's "reliance on market factors to dictate the appropriate rates" of CLECs); *In re Access Charge Reform*, Eighth Report & Order, 19 FCC Rcd. 9108, 9136, ¶ 57 (2004) (rejecting an examination of CLEC costs in providing access services because it would be "contrary to the Commission's market-based approach.").[1]

In addition to being irrelevant as a matter of law, AT&T's entire discussion is premised on the false assumption that "the only service that GLCC appears to be providing (other than

[1] *See also Seventh Report & Order*, 16 FCC Rcd. at 9939 ¶ 41 & n.93 (distinguishing CLECs from ILECs on the grounds that "ILEC access charges have been the product of an extensive regulatory process by which an incumbent's costs are subject to detailed accounting requirements, divided into regulated and non-regulated portions, and separated between the interstate and intrastate jurisdictions.").

agreeing to permit the direct connection service at Spencer) is end office switching." AT&T Br. at 5. AT&T simply assumes away the substantial investments Great Lakes has made in building out its network to carry its customers' traffic in the IP format that the Commission has encouraged carriers to embrace,[2] and which AT&T has refused to do with Great Lakes. *See, e.g.,* AT&T Compl. Ex. 6 (Nelson Dep. 91-98; 124-27) (describing Great Lakes' contribution of fiber facilities, including 28 miles of its fiber between Spencer and Lake Park and substantial facilities leased from another carrier, to enable the termination of Great Lakes' IP customers' traffic); **Exhibit 1** (Excerpt of Nelson Dep. Ex. 31) (invoice reciting the substantial monthly expenses Great Lakes incurs to lease sufficient internet and Ethernet transport circuits to carry its IP traffic between Des Moines and Spencer); *see also* AT&T Compl. Ex. 15 (Great Lakes' August 2014 Monthly Report to the IUB, reciting the completion of its $1.4 million data center, designed to withstand F5 tornados). AT&T's assumption that Great Lakes merely provides its end office switching function to its IP-connection customers is plainly false. Here again, AT&T's economist-like assumptions fail to align with reality.

AT&T also completely ignores a host of other factors that affect the negotiation of such agreements, which helps explain why the Commission wisely chose not to regulate them (or require them). For example, AT&T ignores the economic effects associated with carriers – like AT&T – who engage in self-help and take Great Lakes' tariffed services for free while attempting to extract their own premiums. Clearly Great Lakes has not been providing service to AT&T for the past five years at no cost to itself. Moreover, as the dates of several of the

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[2] *In re Technology Transitions, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, et al*., GN Docket No. 13-5, GN Docket No. 12-353, WC Docket No. 10-90, CG Docket No. 10-51, CG Docket No. 03-123, WC Docket No. 13-97, *Order, Report And Order And Further Notice Of Proposed Rulemaking, Report And Order, Order And Further Notice Of Proposed Rulemaking, Proposal For Ongoing Data Initiative* (rel. January 31, 2014).

agreements indicate, they were entered amidst litigation that had been pending before the FCC issued its *Connect America Fund Order*, which clarified its rules vis-à-vis interexchange carriers' liability for the tariffed access charges of local exchange carriers engaged in access stimulation.[3] AT&T's position also ignores the host of other considerations that go into the negotiation of these agreements, such as any practices of a smaller carrier that have ripple effects on Great Lakes' conferencing customers' services writ large. *See, e.g.,* AT&T Br. at 8 & n.19. Additionally, AT&T does not account for other material considerations that go into such negotiations, including the volumes of traffic and temporal terms of such agreements, the same considerations that go into AT&T's wholesale contracts under which it has been voluntarily accepting Great Lakes-bound traffic and charging its customers under the false pretense that AT&T is actually paying INS and Great Lakes for the important input services that AT&T relies on to be able to complete the calls and collect its charges.

AT&T's lawless profiteering must stop. The Commission should enforce its "bright line" benchmark rule for CLECs' tariffed access charges and reject AT&T's impermissible request to rewrite Section 251(a) of the Communications Act and the Commission's settled body of law governing CLEC access charges.

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[3] Since those rules were clarified, however, AT&T is the only IXC to have engaged in the self-help taking of Great Lakes' access services (all while voluntarily selling Great Lakes' route on the wholesale market and making pure profit thereon). *See* Great Lakes Answer Ex. 29 (Fischer Rebuttal report at 12-14 and Ex. 4 thereto, at 1 & 18-22) (quantifying, through August 2014, AT&T's unjust enrichment in total and from wholesale carriage in particular).

DATED: January 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2017, I caused a copy of the foregoing **Post-Discovery Reply Brief** to be served as indicated in brackets below to the following:

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Respectfully submitted,

Joseph P. Bowser

EXHIBIT 1

Excerpted pages from
J. Nelson Deposition Exhibit 31

HIGHLY CONFIDENTIAL
MATERIALS OMITTED